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## Report of the United Nations High Commissioner for Human Rights**

*Summary*

The present report focuses on the economic, social and cultural rights of migrants in host countries and State obligations in this context. The analysis draws from international instruments, the work of treaty bodies and special procedures mandate holders, as well as international and regional case law to highlight general State obligations and specific obligations regarding various economic, social and cultural rights of migrants.

* E/2010/100.

** The present report was submitted late in order to reflect the most recent information.

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# I. Introduction

1. The present report, submitted pursuant to General Assembly resolution 48/141, focuses on the economic, social and cultural rights of migrants in host countries and State obligations in this context. It should be read in conjunction with previous reports to the Economic and Social Council that have clarified particular aspects of the protection and promotion of economic, social and cultural rights which are also applicable to migrants. These reports have discussed: the issues of legal protection of economic, social and cultural rights (E/2006/86), the concept of "progressive realization" (E/2007/82), the principle of equality between men and women and the prohibition of discrimination against women in respect of their economic, social and cultural rights (E/2008/76), and the implementation and monitoring of economic, social and cultural rights (E/2009/90).

2. An estimated 214 million people currently live outside their country of origin.[1] Migration affects every region of the world. Contrary to popular perception, fewer international migrants move from developing to developed countries than those who move from one developing country to another or between developed countries. While for some migration is a positive and empowering experience, for many others the process of migration is characterized by discrimination, exploitation and a wide range of human rights abuses. Migrants around the world are particularly vulnerable to violations of their economic, social and cultural rights. They are often denied access to public health care, adequate housing and essential social security. Many migrant workers suffer severe abuse of their rights at work, with women migrant workers subject to multiple discrimination. In some cases, they will avoid seeking services for fear of exposure of their status. Migrants are particularly vulnerable because they are outside the legal protection of their countries of nationality. Moreover, as strangers to a society, migrants are often unfamiliar with the national language, laws and practice, and can lack familiar social networks. This makes them less able than others to know and assert their rights.

3. In exploring the human rights of migrants, it is important to situate the international movement of people within the contemporary global context. While poverty, social exclusion or violations of human rights, including economic, social and cultural rights, continue to induce many individuals and families to migrate, recent factors such as the global economic downturn, climate change and food insecurity have added to the already existing factors of vulnerability. Special sessions of the Human Rights Council on the food and financial crises have highlighted the critical vulnerabilities of migrants in these situations. In addition, migrants who are compelled to move as a consequence of environmental degradation and climate change are often extremely vulnerable to human rights violations throughout their migratory journey.

4. The global financial crisis has had an impact on international migration in various ways. In host countries, such crises have encouraged a rise in xenophobia, anti-migrant sentiment and discriminatory practices. Migrant workers are in many cases the first ones to lose their jobs or experience reductions in wages and poorer conditions in the workplace as companies and employers seek to make savings. Cuts in social services provision also impact on migrants' quality of life and health. The

[1] United Nations Development Programme, *Human Development Report 2009 — Overcoming Barriers: Human Mobility and Development* (New York, 2009).

return of migrant workers to their countries of origin in response to loss of jobs or lower earnings can result in the overburdening of already stretched social services in those countries, and may also affect economic and social stability. The subsequent decline in remittance flows may also have an adverse effect on economic, social and cultural rights in the country of origin, including food security.

5. The global food crisis is likely to have a similarly negative impact on migration patterns in some regions, even if the short-term response to such a crisis is not an increase in international migration. Already, it is possible to note that the food crisis has caused increased internal displacement, and has adversely impacted vulnerable groups — such as refugees or internally displaced persons. The rise in food prices may lead to or increase malnutrition, in some cases, exacerbated by decreasing remittance flows. The Food and Agriculture Organization of the United Nations (FAO) has "noted the increasing importance of intra-country and intercountry migrants in contributing to food security and urged all countries to improve the management, education and protection of migrant workers and their families".[2]

6. Climate change is also a driver for migration both in the short and long terms. In the short term, climate events such as flooding, earthquakes, storms and glacial lake outburst floods will cause internal and even international migration. In the longer term, climate processes such as sea-level rise, salinization of agricultural land, desertification and growing water scarcity may cause individuals and communities to set off on migratory movements to fulfil their human rights, such as the right to water.

7. In this context, a careful consideration of legislation and policies is needed by all States in order to adequately respond to issues faced by migrants, to address their vulnerability, and to ensure that their economic, social and cultural rights are not adversely impacted. That is why it is important that States consider a human rights approach to migration. Such an approach means placing the individual migrant at the centre of migration policies, and ensuring his/her protection, participation and access to remedies in case of violations. Accordingly, the human rights impact of migration legislation and administrative practice must be a central consideration in the formulation and implementation of policy. Periods of crisis, whether real or perceived, are often marked by an increase in xenophobia, anti-migrant sentiments and discriminatory practices affecting the human rights of migrants. This is especially pernicious when such sentiments are reinforced by legislation, regulations and policies which criminalize and exclude migrants. The increased recourse by States to the administrative detention of migrants in an irregular situation has resulted in many migrants being exposed to unnecessary, prolonged, or (potentially) indefinite detention, and to violations of their rights to health and education or to an adequate standard of living, among others.

8. Given the indivisibility and interdependence of all human rights, the failure to protect and ensure economic, social and cultural rights can also have severe consequences for the realization of civil and political rights and vice versa. For instance, a requirement to present a residence permit in order to register a child at birth effectively deprives irregular migrant children of the right to personal identity

[2] "Report of the Twenty-fifth FAO Regional Conference for Asia and the Pacific", Yokohama, Japan, 28 August-1 September 2000 (APRC/00/REP), para. 66.

and citizenship at the time of birth, which can also deny them access to education. It is important to note that protecting economic, social and cultural rights is closely linked to social inclusion and integration of migrants, which in turn enables them to lead economically productive and culturally and socially enriching lives. The Committee on the Elimination of Racial Discrimination has therefore urged States to "remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health" (general recommendation No. 30, para. 29).

# II. Obligations of States in regard to economic, social and cultural rights of all migrants

9. States' obligations in relation to the economic, social and cultural rights of migrants can be analysed through the content and authoritative interpretation of instruments specifically formulated to protect the rights of migrants, and also through general obligations assumed by States towards all persons on their territory or under their jurisdiction, irrespective of their status.

10. Various terms have been used, for instance in the work of treaty bodies, to describe the category of "migrants": these include legal and illegal, regular and irregular, or documented and undocumented.[3] For the purpose of the present report, the term "regular" will be used to encompass the concepts of "legal" and "documented", i.e., a migrant who is legally authorized to enter and remain in a country of destination. Similarly, the terms "irregular" and "undocumented" migrants will be used to define those who lack legal status in a transit or host country.

## A. General obligations

11. Founded upon the inherent dignity and equal and inalienable rights of every human being, the principles of equality and non-discrimination lie at the heart of international human rights law. While the Universal Declaration of Human Rights asserts that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind" (article 2), the International Covenant on Economic, Social and Cultural Rights guarantees to "everyone" the rights contained within the Covenant. The Human Rights Committee has provided that "the rights set forth in the Covenant [on Civil and Political Rights] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness" (general comment No. 15). In accordance with these principles and the provisions set out in the core universal human rights instruments, international law dictates that States retain obligations to respect, protect and fulfil the fundamental human rights of all individuals within their territory, including all migrants.

[3] See Global Migration Group, International Migration and Human Rights, October 2008. It should be noted that there remains no universal definition of a "migrant". However, article 2, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".

12. Migration has been considered by treaty bodies under different prohibited grounds of discrimination. In its general comment No. 20, the Committee on Economic, Social and Cultural Rights considers nationality as a prohibited ground of discrimination, and considers that the rights in the Covenant apply to ". everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, **migrant workers** and victims of international trafficking, regardless of legal status and documentation" (emphasis added). In its general comment No. 30, the Committee on the Elimination of Racial Discrimination includes migrants in the category of non-citizens and prohibits discrimination in this regard. Therefore, the concepts of nationality and citizenship, although different from migration, are important to consider and have been used to encompass migration status.

13. International human rights law provides for the possibility, in specific circumstances, of making legitimate distinctions between citizens and non-citizens, such as article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination. Yet, this differentiation has defined limits: "[A]lthough some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law" (Committee on the Elimination of Racial Discrimination, general comment No. 30, para. 3).

14. Thus, legitimate distinctions between citizens and non-citizens, between migrants and non-migrants, or between different groups of migrants, must be based on "proportionate and reasonable" criteria (Committee on Economic, Social and Cultural Rights, general comment No. 19, para. 37). Generally, these criteria must be proportional to the purpose for which they are adopted by the State, and the purpose or aim itself must be legitimate. Treaty bodies, including the Human Rights Committee, have defined the scope of these criteria in their consideration of cases.[4] For the Committee on the Elimination of Racial Discrimination, "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim" (general comment No. 30, para. 4). "Special measures" for the purpose of securing adequate advancement of certain racial or ethnic groups do not fall under the scope of the International Convention on the Elimination of All Forms of Racial Discrimination (article 1, para. 4). There may be grounds, in some situations, for differential treatment between migrants and non-migrants in specific areas as long as minimum core obligations are not concerned: differentiations cannot lead to the exclusion of migrants, regular or irregular, from the core content of economic, social and cultural rights. In addition, it could be also argued that differential measures taken by the State in relation to economic, social and cultural rights should not be retrogressive and should be in line with States' obligations to take steps towards the progressive realization of economic, social and cultural rights, with particular attention to the most vulnerable groups — which in many countries will include migrants.

15. Similarly, article 2, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights creates a limited exception to the general rule of equality

[4] For instance, CCPR/C/50/D/488/1992 or CCPR/C/81/D/943/2000.

in stating that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals". Nevertheless, this provision is to be narrowly construed, and may be relied upon only by developing countries, and only with respect to economic rights.[5] Therefore, any distinctions made between nationals and non-nationals or between regular and irregular migrants, in relation to economic, social and cultural rights, should serve a legitimate purpose, and be proportional to the achievement of that purpose. International human rights law, therefore, places narrow limits on permissible distinctions and provides that in all cases such distinctions must not interfere with the ability of the migrant to enjoy his or her fundamental human rights.

16. Regional case law also confirms this interpretation. For instance, the Inter-American Court of Human Rights has issued an important advisory opinion in which it makes clear that, under the American Convention on Human Rights, the principle of equality and non-discrimination is an *erga omnes* human rights principle, and therefore it fully applies to the labour conditions of migrant workers, whether documented or undocumented. For the Court: "a person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination", and "the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment".[6]

## B. Education

17. According to the Committee on Economic, Social and Cultural Rights, the provision of primary education for all is one of the core contents of the right to education (general comment No. 13, para. 57). As seen before, any differential treatment which results in denying or restricting other aspects of the right to education on this basis would be considered a priori violation of that right, unless it is based on objective and reasonable criteria. In this context, the migration status of children — documented or undocumented — may not be used by States to justify different treatment. It should be noted that in various countries, all children, regardless of their status, are granted access to primary education.

18. Regarding the right to education of non-nationals, the Committee on the Elimination of Racial Discrimination holds that States parties are obliged to "ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party" and to "avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education" (general recommendation No. 30, paras. 30 and 31).

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[5] David Weissbrodt, Final report on the rights of non-citizens (2003), E/CN.4/Sub.2/2003/23, para. 19. Measures taken by States to protect their citizens and economies from non-citizens should not be taken to the detriment of the enjoyment of human rights (*FIDH v. Angola*, African Commission on Human and Peoples' Rights, Comm. No. 71/92 (October 1997), para. 16.

[6] See Inter-American Court of Human Rights, advisory opinion OC-18/03 of 17 September 2003, paras. 109, 133 and 134, respectively.

19. Additional guidance comes from the Convention on the Rights of the Child: the priority of the best interests of the child (article 3, para. 1) and the legal obligation to register children immediately after birth and grant them a name and nationality (article 7, para. 1) are particularly relevant for primary education, and also apply to secondary education, as long as students are under 18 years old. For example, the undocumented migrant status owing to non-compliance of the obligation to register children immediately after birth could never justify exclusion from access to education. The prohibition of discrimination on the basis of nationality equally applies in this area. Moreover, the Committee on the Rights of the Child has explicitly stated that "the principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant" (general comment No. 6, para. 18).

20. Article 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which applies to all migrant workers and their families, regardless of their status, states that: "Each child of a migrant worker shall have ... access to education on the basis of equality of treatment with nationals of the State concerned. Access to public preschool educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect of stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment." According to article 45, paragraph 1, of the Convention, which applies to migrant workers and members of their families who are documented or in a regular situation, members of the families of migrant workers shall enjoy equality of treatment with nationals of the host State in relation to "access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned", and "access to vocational guidance and training institutions and services, provided that requirements for participation are met".

21. Regional standards mirror such an approach. Article 2 of Protocol No. 1 to the European Convention on Human Rights, read in conjunction with article 14 of the European Convention, forbids detrimental differential treatment on the basis of nationality regarding the right to education, unless objective and reasonable criteria — which would be strictly scrutinized — justify such treatment.[7] Furthermore, Protocol No. 14 to the European Convention extends the application of the prohibition of discrimination to every human right, including the right to education, even if the State party is not also a party to Protocol No. 1 to the European Convention on Human Rights. In turn, article 17, paragraph 2, of the Revised European Social Charter established the obligation of States parties "to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools". Paragraphs 11 and 12 of article 19 establish the duty of States parties to promote and facilitate the teaching of the national language of the receiving State and the teaching of the migrant worker's mother tongue to his or her children. According to article E, "the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political

[7] See, generally, European Court of Human Rights, *Gaygusuz v. Austria*, judgment of 16 September 1996, para. 42.

or other opinion, national extraction or social origin, health, association with a national minority, birth or other status".

22. However, article 1 of the Appendix of the Revised Charter states that "without prejudice to article 12, paragraph 4, and article 13, paragraph 4, the persons covered by articles 1 to 17 and 20 to 31 include foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of articles 18 and 19". Nonetheless, the application of this clause has been very narrowly construed by the European Committee of Social Rights when applied to children, in the light of the duty to act in their best interest.[8] Resolution 1509 (2006) of the Parliamentary Assembly of the Council of Europe states in its article 13.6 that "all children have a right to education, extending to primary school and secondary school levels, in those countries where such schooling is compulsory. Education should reflect their culture and language and they should be entitled to recognition, including through certification, of the standards achieved."[9]

23. Article 1, paragraph 1, of the American Convention on Human Rights defines "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition" as forbidden grounds for discrimination. When read in conjunction with article 26 of the Convention, which refers to economic, social and cultural rights, the prohibition of discrimination on the basis of nationality, as "other social condition", also applies to the right to education. Moreover, article 24 establishes that "all persons are equal before the law", and that "consequently, they are entitled, without discrimination, to equal protection of the law". Article 19 also grants special protection without discrimination to children. The Inter-American Court of Human Rights has asserted that access to education is one of the special protection measures with which States parties are obliged to comply. For the Court, failure to grant access to education to undocumented children of migrant origin amounted to a violation of the State's duty to provide free primary education to all children.[10]

24. In addition, useful guidance is found in the work of special procedures mandate holders, such as the latest report of the Special Rapporteur on the right to education looking into the right to education of migrants, asylum-seekers and refugees.[11]

## C. Health

25. Article 12 of the International Covenant on Economic, Social and Cultural Rights provides the most comprehensive clause on the "right of everyone to the

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[8] See European Committee of Social Rights, Complaint No. 14/2003, *International Federation of Human Rights Leagues (FIDH) v. France*, decision on the merits of 3 November 2004, paras. 29-32; and Complaint No. 47/2008, *Defence for Children International v. The Netherlands*, decision on the merits of 20 October 2009, paras. 34-38.

[9] Parliamentary Assembly of the Council of Europe, resolution 1509 (2006), entitled "Human rights of irregular migrants".

[10] See Inter-American Court of Human Rights, *The Girls Yean and Bosico v. Dominican Republic*, judgment of 8 September 2005, para. 185.

[11] A/HRC/14/25 and Corr.1.

enjoyment of the highest attainable standard of physical and mental health". In paragraph 34 of its general comment No. 14, the Committee on Economic, Social and Cultural Rights refers to the obligation of States "to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including ... asylum-seekers and illegal immigrants, to preventive, curative and palliative health services". In prohibiting discrimination based on nationality, the Committee notes, for example, that all children within a State, including those with an undocumented status, have a right to receive affordable health care (general comment No. 20, para. 30).

26. In other words, under the International Covenant on Economic, Social and Cultural Rights (article 12), States are required to take steps to achieve the full realization of health, including maternal, child and reproductive health; the improvement of all aspects of environmental and industrial hygiene; and the prevention, treatment and control of diseases. These are centrally relevant to the right to health of migrants, whether in transit or in host countries, regardless of their legal status. In the case of environmental and industrial hygiene, they are especially relevant for migrant workers, and — when applicable — could be read in conjunction with ILO recommendation No. 151 concerning migrant workers (1975).[12]

27. The Committee on Economic, Social and Cultural Rights further clarifies that the right to health includes both "freedoms" and "entitlements". For instance, freedoms include the right to be free from non-consensual medical treatment or forced HIV testing. Similarly, freedom from torture and other cruel, inhuman or degrading treatment is an important component of the realization of the right to health. Entitlements refer to the right to a system of protection on an equal basis for all; a system of prevention, treatment and control of diseases; access to essential medicines, sexual and reproductive health; and access to information and education about health in different formats and languages, particularly to prevent unhealthy or risky behaviour.

28. In order to comply with these obligations, States parties must consider the following elements, with the inclusion of special measures for particular population groups, such as migrants, when needed: (a) the availability of functioning public health facilities, goods and services, as well as programmes; (b) their accessibility, including both its physical and financial aspects; (c) their acceptability, e.g., health facilities, goods and services must be gender-sensitive, culturally appropriate and respectful of confidentiality; and (d) all health facilities, goods and services must be of good quality in scientific and medical terms (Committee on Economic, Social and Cultural Rights, general comment No. 14, para. 12).

29. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also reinforces the principle of non-discrimination by expressly providing that all migrant workers and their families are entitled to economic and social rights on an equal basis, regardless of their legal status. Article 28 recognizes that migrant workers and members of their families have "the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the

[12] See also International Organization for Migration, *Migration and the Right to Health: a Review of International Law*, 2009, p. 184.

basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment." In the absence of an effective definition of what constitutes "emergency health care", migrants can be denied access to primary level health interventions, resulting in treatable conditions becoming chronic.

30. Migrants can be prevented from gaining effective access to health care in a number of ways beyond express prohibition: high costs making access unaffordable; the requirement of immediate payment or proof of payment before the service is even received; the use of health care and services as an instrument of immigration control policies such as the duty to report undocumented migrants by health professionals; fear of deportation or detention; and, finally, lack of information about a migrant's entitlements and guarantees in relation to health services and goods.

31. The Committee on the Elimination of All Forms of Discrimination against Women has focused attention on the situation of women migrant workers, including in relation to the right to sexual and reproductive health. As noted in its general recommendation No. 26, "Discrimination may be especially acute in relation to pregnancy. Women migrant workers may face mandatory pregnancy tests followed by deportation if the test is positive; coercive abortion or lack of access to safe reproductive health and abortion services, when the health of the mother is at risk, or even following sexual assault; absence of, or inadequate, maternity leave and benefits and absence of affordable obstetric care, resulting in serious health risks. Women migrant workers may also face dismissal from employment upon detection of pregnancy, sometimes resulting in irregular immigration status and deportation."

32. Some issues related to the situation of persons living with HIV deserve careful consideration. These include: restrictions on HIV-positive asylum-seekers; travel restrictions, broadly speaking, for persons living with HIV and sometimes specific targeting of nationals from certain high prevalence countries; deportation upon arrival and upon renewing residency when receiving an HIV-positive diagnosis even in situations where HIV counselling, treatment and care is unavailable or inaccessible in a person's country of origin.

33. Indeed, the denial of health care may also be interpreted as conflicting with the prohibition of inhuman and degrading treatment in the context of expulsion of migrants to a country where their illness cannot be treated.[13] In regard to an expulsion case, the European Court of Human Rights held that the "abrupt withdrawal of medical treatment caused by the deportation" could expose the complainant "to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment".[14] This interpretation was subsequently endorsed by the Committee against Torture[15] and the Human Rights Committee.[16]

34. In terms of acceptability and quality of services, some national health systems have developed a variety of migrant-sensitive health services. These services

[13] Chetail and Giacca, "Who cares? The right to health of migrants", in *Realizing the Right to Health, Swiss Human Rights Book*, vol. 3.

[14] European Court of Human Rights, *D v. United Kingdom*, judgment of 2 May 1997 (1997), 24 EHRR 423, paras. 53 and 54.

[15] Committee against Torture, *G.R.B. v. Sweden*, CAT/C/20/D/83/1997, 15 May 1998, para. 6.7.

[16] Human Rights Committee, *C. v. Australia*, CCPR/C/76/D/990/1999, 28 October 2002, para. 6.

include the provision of interpretation, translated written materials and "cultural mediation" services in hospitals and health centres. These services tackle the language barriers that may have a negative effect on care and prevention services, treatment plans and appropriate follow-up, as misunderstandings of symptoms or mistranslations may result in delayed care, clinically significant medical errors, and death.

35. Health professionals and administrative staff in health facilities in several countries are also receiving training on what is sometimes called "culturally competent sensitive care". It refers to the incorporation of relevant attitudes, knowledge, and interpersonal skills related to the care of patients from different cultural backgrounds. In the case of migrant populations, this would also encompass being familiar with the health and social issues related to the experience of each migrant group. There are cultural, religious, social and gender factors that come into play in the negotiation and implementation of treatment plans for a variety of general health issues, such as reproductive and child health, chronic disease management, ageing and end-of-life care; as well as specific issues that may affect migrant populations, such as consanguineous marriages, female genital mutilation and the effects of torture and trauma.[17]

## D. Housing

36. The obligation to guarantee equal access and enjoyment of the right to adequate housing has been confirmed on many occasions at the international and regional level. In paragraph 6 of its general comment No. 4 describing the core elements of this right, the Committee on Economic, Social and Cultural Rights states that "the right to adequate housing applies to everyone" and that "individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors". In the light of the work of the Committee, the term "status and other such factors" includes migrants. The Committee further states that "enjoyment of this right must, in accordance with article 2, paragraph 2, of the Covenant, not be subject to any form of discrimination". For the Committee on the Elimination of Racial Discrimination, States must "guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens" (general recommendation No. 30, para. 32). Article 43 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families guarantees equal treatment in access to housing, including social housing schemes, and protection against exploitation in respect of rents to regular migrants and their families. In the regional context, the Parliamentary Assembly of the Council of Europe has noted that "adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants".[18]

37. Yet, in practice, migrants face many barriers and discrimination to access adequate housing. Various special procedures mandate holders have reported on the migrants' housing situation, such as the Special Rapporteur on adequate housing or the Special Rapporteur on the human rights of migrants, including in his latest

[17] For more details, see World Health Organization-International Organization for Migration, Global Consultation on Migrant Health, Madrid, 3-5 March 2010, Background paper on migrant-sensitive health systems.

[18] Parliamentary Assembly of the Council of Europe, resolution 1509 (2006), para. 13.1.

report focusing on the health and housing of migrants.[19] While migrant workers should in theory enjoy equal treatment with nationals in relation to access to housing, including social housing schemes, and protection against exploitation in respect of rents (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 43, para. 1 (d)), the housing of migrant workers has been problematic in many parts of the world. In some countries, employers are required to provide housing for the workers they hire from abroad. However, even when housing is provided by the employer, in many cases it is inadequate, or the employer will take high fees for the housing out of the workers' pay. In some cases, several workers have to share the same bed in turn, a phenomenon sometimes referred to as "hot beds".[20] Because of their particular situation, including lack of knowledge of administrative and judicial mechanisms and lack of language skills, migrants can also be more vulnerable to evictions even on unjustified grounds. In this regard, the Committee on the Elimination of Racial Discrimination recommended that States should ensure that housing agencies refrain from engaging in discriminatory practices (general recommendation No. 30, para. 32).

38. In many countries, domestic migrant workers live in the house where they are employed, resulting in a lack of privacy, often in substandard accommodation (such as being forced to sleep in hallways or closets) and being compelled to remain on duty 24 hours a day. In some cases the domestic migrant workers have been subjected to physical, psychological and sexual violence. Moreover, such workers are vulnerable to being evicted from accommodation provided with their work[21] and may feel compelled to put up with abuse to avoid becoming homeless. In this context, various types of emergency shelters are essential to accommodate migrants who are victims of domestic violence or homeless.

39. The spatial location of housing allocated to migrants may lead to further marginalization. States must act to avoid segregation in housing (Committee on the Elimination of Racial Discrimination, general recommendation No. 30, para. 32). The Committee on Economic, Social and Cultural Rights has expressed concern that migrant families "are disproportionately concentrated in poor residential areas characterized by large, low-quality and poorly maintained housing complexes" and recommended "the effective implementation of existing legislation to combat discrimination in housing, including discriminatory practices carried out by private actors". The Committee also urged the State party to improve the housing situation of low-income households, inter alia through the construction and renovation of social housing complexes (E/C.12/FRA/CO/3, paras. 21, 41 (c) and 43).

40. In many situations because of their status, irregular migrants, including rejected asylum-seekers, continue to suffer violations of their right to adequate housing. Irregular migrants are in many cases confronted with homelessness, and live in shacks, derelict or unfinished buildings or in the open air. For the European Committee of Social Rights, the right to shelter is directly linked to the rights to

[19] A/HRC/14/30.

[20] See, for instance, the report of the Special Rapporteur on adequate housing (A/HRC/7/16/Add.2).

[21] See, for instance, the report of the Special Rapporteur on adequate housing (E/CN.4/2006/118), para. 68.

life, social protection and respect for the child's human dignity and best interests, regardless of his or her residence status.[22]

## E. Food

41. Article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights stipulates that everyone has the right "to an adequate standard of living for himself and his family, including adequate food". Furthermore, article 11, paragraph 2, recognizes "the fundamental right of everyone to be free from hunger". The Convention on the Rights of the Child, in article 27, paragraph 3, requests States parties to combat child malnutrition. As defined by the Committee on Economic, Social and Cultural Rights, food should be available, accessible and adequate. The Committee has emphasized the importance of ensuring "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture" (general comment No. 12, para. 8).

42. Structural causes of food insecurity and the impact of climate change are affecting people's capacity to produce food, and thus negatively affecting the right to food of marginalized groups, including migrants.

43. Violations of the right to food of migrants can take various forms. One of the reported forms of mistreatment of domestic workers is food deprivation or the denial of adequate food in terms of quantity or quality, resulting in loss of weight and health consequences. Some employers may also use food deprivation as a punishment for "mistakes" made by the workers.[23] The Special Rapporteur on the human rights of migrants further highlighted the lack of food and limited access to food of migrants who are detained (E/CN.4/2003/85/Add.4, para. 12). In this regard, the Special Rapporteur on the right to food emphasized that States have a direct obligation to ensure that detained persons, including migrants, have the right to adequate food, as they are considered to be unable to feed themselves (E/CN.4/2002/58, para. 46). In addition, the Special Rapporteur on the right to food stressed that "discrimination in access to food on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status cannot be justified under any circumstances, including low levels of resources" (ibid., para. 41).

44. For some migrants, food and its procurement and consumption can have important cultural connotations. Adequate food that is available and accessible to migrant workers should be thus culturally acceptable. The Special Rapporteur on the human rights of migrants had accordingly noted that many detention facilities do not make adequate arrangements to provide culturally appropriate foods to migrants (E/CN.4/2003/85, para. 53).

45. The FAO *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*[24] provide a

[22] Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, Decision on the merits, 20 October 2009.

[23] See, for instance, document A/HRC/11/6/Add.3, para. 59.

[24] Council of the Food and Agriculture Organization of the United Nations, 127th session, November 2004.

practical tool to assist States to implement the right to adequate food. In particular, guideline 12.5 invites States "to take appropriate steps and suggest strategies to contribute to raise awareness of the families of migrants in order to promote efficient use of the remittances of migrants for investments that could improve their livelihoods, including the food security of their families".

## F. Social security and social protection

46. While in some cases the possibility of a differential level of social security or social protection may exist, in principle, States cannot arbitrarily exclude migrant workers from social security and social protection schemes. The principle of equality and prohibition of discrimination on the basis of nationality also applies to the right to social security, including social insurance and social protection. Migrant workers participate in the workforce and the economy of States of employment, and thus usually contribute to social insurance schemes, benefiting the whole range of scheme as right-holders. Even if not participating in contributory schemes, migrant workers also contribute to social protection schemes and programmes, at the very least by paying indirect taxes. In addition, migratory status, either documented or undocumented, should not be considered relevant when it comes to social protection schemes directed to alleviating extreme poverty or vulnerability.

47. According to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 27), all migrant workers and members of their families shall enjoy in the State of employment the same treatment as nationals regarding social security, insofar as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. States should also examine the possibility of reimbursement of contributions, when the applicable legislation does not allow migrant workers a benefit.

48. The Committee on Economic, Social and Cultural Rights has made clear that the right to social security includes both contributory and non-contributory schemes, and that non-discrimination and equality fully apply to that right. The Committee has explicitly held that "article 2, paragraph 2 [of the International Covenant on Economic, Social and Cultural Rights], prohibits discrimination on grounds of nationality, and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlement should also not be affected by a change in workplace" (general comment No. 19, para. 36). Regarding non-contributory schemes, the Committee said that "non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care" (general comment No. 19, para. 37). The Committee also noted "the importance of establishing reciprocal bilateral and multilateral international agreements or other instruments for coordinating or harmonizing contributory social security schemes for migrant workers" (general comment No. 19, para. 56).

49. The European Court of Human Rights has also considered in a number of cases the application of the prohibition of discrimination to social security and social protection schemes. The Court made clear that distinctions based on nationality are in principle not acceptable, and that the States will have a high burden if they want to justify such distinctions. In the *Gaygusuz* case, the European Court held that "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention", and thus considered that the reasons offered by the State to justify a different treatment of nationals and non-nationals regarding the emergency advancement of contributory pension benefits were insufficient, and therefore, that such disparate treatment was discriminatory.[25] In the *Koua Poirrez* case, the European Court reiterated this doctrine, extending it to non-contributory benefits. The Court found that disparate treatment on the basis of nationality regarding a non-contributory disability allowance was non-justified and therefore discriminatory.[26]

50. For the Parliamentary Assembly of the Council of Europe, "social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity. Children are in a particularly vulnerable situation and they should be entitled to social protection, which they should enjoy on the same footing as national children." Furthermore, "irregular migrants who have made social security contributions should be able to benefit from these contributions or be reimbursed if expelled from the country".[27]

## G. Work and labour rights

51. Protection of workers against exploitation and abuse is a core component of labour-related human rights, particularly in situations of vulnerability and a large power imbalance between workers and employers. International human rights law and international labour law converge on this matter. Labour rights apply with no restriction to all migrant workers, regardless of their status, and the enforcement of such rights is in fact particularly important for the protection of migrant workers. The 1998 ILO Declaration on Fundamental Principles and Rights at Work includes the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation, and freedom of association and the effective recognition of the right to collective bargaining. The prohibition of discrimination on the basis of nationality ensures the full application of all labour protections to migrant workers.[28]

52. The Committee on Economic, Social and Cultural Rights has highlighted the applicability of the right to work to migrants, by recalling that "the principle

[25] See European Court of Human Rights, *Gaygusuz v. Austria*, judgment of 16 September 1996, paras. 42, 50 and 52.

[26] See European Court of Human Rights, *Koua Poirrez v. France*, judgment of 30 September 2003, paras. 48-50.

[27] Parliamentary Assembly of the Council of Europe, resolution 1509 (2006), paras. 13.3 and 13.4.

[28] See, in particular, International Labour Organization Conventions Nos. 97 and 143 and articles 11, 25, 26, 51, 52, 54 and 55 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. See also *ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (Geneva, International Labour Office, 2006).

of non-discrimination as set out in article 2, paragraph 2, of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families". The Committee stressed that "States parties are under the obligation to respect the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers" (general comment No. 18, paras. 18 and 23).

53. The Committee on the Elimination of Racial Discrimination has held, inter alia, that States parties should take measures "to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects" and "to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault". Furthermore, the Committee recognized that, "while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated" (general recommendation No. 30, paras. 33-35).

54. Regional human rights bodies have strongly sustained the applicability of labour protections to migrants, including irregular migrants. As stated by the Inter-American Court of Human Rights: "On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment."[29] In the case of *Siliadin v. France*, the European Court of Human Rights fully applied article 4 of the European Convention on Human Rights, which prohibits slavery, servitude and forced or compulsory labour, regardless of the fact that the victim is a migrant. In this case, the victim, at the moment when the violation took place, was an undocumented child migrant, forced to work as a domestic worker with no pay and no rest, under promise of regularization.[30]

## H. Cultural rights

55. The protection of migrants' cultural rights has been highlighted on many occasions, such as in general comment No. 21 of the Committee on Economic, Social and Cultural Rights. For that Committee, "States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin". Moreover, States should take "appropriate measures or programmes to support minorities or other communities,

[29] Inter-American Court of Human Rights, advisory opinion OC-18/03 of 17 September 2003, para. 134.

[30] See judgment of 26 July 2005, paras. 109-129. See also the report of the Special Rapporteur on the human rights of migrants, which highlights the situation and legal standards applicable to migrant domestic workers (E/CN.4/2004/76).

including migrant communities, in their efforts to preserve their culture" (general comment No. 21, paras. 34 and 52 (f)).

56. For the Human Rights Committee, article 27 of the International Covenant on Civil and Political Rights, e.g., the right of minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language, applies to migrant workers (general comment No. 23, paras. 5.1 and 5.2). In this context, provisions of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities should be kept in mind.

57. Similarly, article 31 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families stresses the State's obligation to respect the cultural identity of migrant workers and members of their families and not to prevent them from maintaining their cultural links with their State of origin. Migrant workers enjoy equality of treatment with nationals of the State of employment in relation to access to and participation in cultural life (article 43 (g)). Migrants are entitled to take part in and form associations and trade unions with a view to protecting their economic, social, cultural and other interests (articles 26 and 40). Moreover, the State of employment "shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them" (article 43, para. 3). It is important to note that the respect for migrants' cultural identity also applies in detention (article 17).

58. In regard to children, States of employment "shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate" (article 45, para. 3). In addition, "States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin" (article 45, para. 4).

# III. Conclusions

59. The access of migrants to economic, social and cultural rights is not a matter of charity. Migrants are entitled to expect that their human rights be respected, protected and fulfilled wherever they are. States should therefore adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate discrimination against all migrants, regardless of their status grants. To this end, States need to consider different forms of discrimination that may occur formally (de jure) or substantially (de facto). As the Committee on Economic, Social and Cultural Rights states in general comment No. 20: "Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds". But there is in addition a pressing need to address substantive discrimination: "The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (E/C.12/GC/20, para. 8 (a) and (b)).

60. It is important to consider the effects of direct and indirect discrimination. In the context of migration, direct discrimination can occur when a migrant is treated

less favourably than a national in a similar situation for a reason related to a prohibited ground. This is the case where costs of housing are proportionally higher for migrants than for nationals. Indirect discrimination "refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination" (general comment No. 20, para. 10 (b)). For instance, requiring the production of a residence permit in order to access public health clinics will discriminate against irregular migrants.

61. According to the guidance of treaty bodies and other authoritative bodies, including those in the regional human rights system, minimum core obligations in the realm of economic, social and cultural rights should be respected for all, including irregular migrants. Nevertheless, measures of immigration control can sometimes have the purpose or effect of deterring irregular migrants from accessing economic, social and cultural rights such as health services or facilities, education and housing, or can use the denial of such rights as a means to deter migrants from entering the country, which in turn could be seen as disproportionate. Irregular migrants will often refrain from utilizing public services to which they are entitled in law, such as emergency health care or primary education, out of fear of detention and deportation. This is heightened when countries impose a duty on public officials to denounce the presence of irregular migrants. In such cases, even if the human rights of migrants are protected by the law, migrants in an irregular situation may not enjoy these rights in practice. Irregular migrants are, in addition, often invisible to official integration measures and action plans and strategies on public services, such as housing, health or water and sanitation, leaving these migrants vulnerable to systematic exclusion, discrimination and abuse.

62. In order to ensure effective protection of the rights of all migrants, it is important that further and more detailed guidance is provided on the obligations of States in regard to the human rights of regular and irregular migrants, including on economic, social and cultural rights. In this respect, treaty bodies may wish to consider further developing their interpretation of international human rights instruments in specific general comments, and to systematically include examination of the situation of migrants in their State questionnaires, and in their recommendations and concluding observations on State reports.